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Supreme Court of the United States

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL.,
Petitioners,

v.

SUN OIL COMPANY, ET AL.

No. 496

SUN OIL COMPANY, ET AL.,
Cross-Petitioners,

v.

G. E. BURFORD, ET AL.

REPLY TO THE DISCUSSION OF QUESTIONS SUBMITTED BY THIS COURT FILED HEREIN BY THE ATTORNEYS FOR THE RAILROAD COMMISSION AND G. E. BURFORD

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PRESS OF VON BOECKMANN-JONES CO. AUSTIN, TEXAS

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I

It is insisted that the litigation authorized by Section 8 of Article 6049c, Vernon's Texas Civil Statutes, is not an actual "case or controversy" within the meaning of Article III of the Constitution of the United States, because it does not in-

volve the legal contentions of parties who have adverse legal interests.

Spear vs. Humble O. & Refining Co., 139 S. W. (2d) 212, and *Railroad Commission vs. Shell Oil Company*, 165 S. W. (2d) 503 (error refused) are cited in support of the statement that "a 'dissatisfied interested person' seeking a judicial determination of the validity of an order of the Texas Railroad Commission need show no injury under the Texas law".

We submit that two cases cited make no such holding.

In the *Spear* case the discussion of this question was as follows:

> "In this connection, the majority do not sustain the remaining contention of appellant raising the question that it was necessary for appellee to allege that it would not be able during the producing life of the field and the wells on its tract to recover through such wells the amount of oil equivalent to the amount of oil beneath such tracts; **nor to show injury to its private property rights sufficient to call for the intervention of the court of equity.** It is the majority view that this question has been raised in numerous cases and that **it has been overruled by the court; and that the Supreme Court has dismissed and refused writs of error in such cases; and deem the matter as being foreclosed by such decisions.** The writer's view on the matter is set forth in the above discussion of the correlative right of the parties."

The Supreme Court did not refuse the application for writ of error in this case, but dismissed it,

which, under the terms of Article 1728 of the Texas statutes then in force, meant that the Supreme Court held that the judgment of the Court of Civil Appeals was a correct one, but that it was not satisfied that the opinion of said court in all respects has correctly declared the law.

The opinion in *Railroad Commission vs. Shell*, 165 S. W. (2d) 503, also fails to support the contention made by these attorneys. After stating that the appellants contended that it was not shown that the two wells would actually drain any oil from the Shell lease, the Court made the following statement:

> * * * "The Shell lease abutted the 6.07 a. tract on the west, and Shell was a party to the proceeding before the Commission. **Under repeated decisions it was an interested party, within our conservation statutes (Vernon's Ann. Civ. St. art. 6049c) and rules of the Commission, and was entitled to maintain the suit.** Empire Gas & Fuel Co. v. Railroad Comm., Tex. Civ. App., 94 S. W. (2d) 1240, error refused; Railroad Comm. v. Gulf Production Co., Tex. Civ. App., 115 S. W. (2d) 505, affirmed 134 Tex. 122, 132 S. W. (2d) 254; Stanolind Oil & Gas Co. v. Midas Oil Co., Tex. Civ. App., 123 S. W. (2d) 911 error dismissed."

In *Empire Gas & Fuel Co. vs. Railroad Commission*, 94 S. W. (2d) 1240 (error refused), the first case cited in said Shell case, the Court of Civil Appeals said:

> "The statute (article 6049c, Vernon's Ann. Civ. St.) does not define who are 'interested parties affected' by orders granting exceptions to rule 37, but does authorize such interested

parties so affected to attack such orders by suit. Obviously such a definition, if attempted by the Legislature, would not be practicable. Whether such exception 'affects' the interest or property rights of a leaseholder who attacks it **is generally a fact question dependent upon the facts and circumstances of the particular case,** and no hard and fast rule could well be laid down. **We do not think the statute contemplated the inclusion within its terms of those only remotely interested and affected by such order; but does include those whose lands and property rights are materially and substantially affected by such exception,** though their lands may not immediately adjoin the tract involved. Undoubtedly the well in question did substantially affect the 6 3/4 acres, the south boundary line of which was 430 feet (less than the 660 spacing distance for wells in this area) from the Gulf Production Company's lease. And the density of the drilling in the immediate area of this 6 3/4 acre tract was clearly of such consequence as to affect the Gulf's lease to the south thereof and adjacent to the 40-acre lease of the appellant out of which it was carved. The Gulf offered testimony of R. D. Parker, which was excluded, that if said well were drilled and offsets permitted, a further density of drilling would result in this area which would not only cause waste, but would materially drain oil from the Gulf's lease. Under all the facts and circumstances, therefore, we conclude that the Gulf showed such an interest in the suit as to make it a proper, if not a necessary, party, entitling it to intervene to protect its interests; and that the trial court erred in dismissing it from the suit."

In *Railroad Commission vs. Gulf Production Com-*

pany, 115 S. W. (2d) 505, affirmed in 134 Tex. 122, 132 S. W. (2d) 254, the second case cited in said Shell case, the court used the following language:

> "The Railroad Commission also contends that appellee, Gulf Production Company, did not show itself to be 'an interested person affected by' the permit here involved, within the meaning of the amended statute, article 6049c, section 8, Vernon's Ann. Civ. St., authorizing it to attack the permit. This contention is not sustained. Of the two wells on Tippett's tract, one was 50 feet and the other 87.5 feet from the line of the Gulf's lease. Whereas, of the two wells on the Gulf lease, south of these two wells, one was 183 feet and the other 141 feet from Tippett's line, thus giving Tippett a clear drainage advantage on that side of his tract. The third well granted thereon was located 87.5 feet from the Gulf's line, thus increasing the drainage from the Gulf lease. Manifestly, the Gulf was affected by such permit within the meaning of the statute. Empire Gas & Fuel Co. v. Railroad Commission, Tex. Civ. App., 94 S. W. (2d) 1240, writ refused; Murphy v. Turman Oil Co., Tex. Civ. App., 97 S. W. (2d) 485, writ refused 300 U. S. 685, 57 S. Ct. 752, 81 L. Ed. 887."

In *Stanolind Oil & Gas Company vs. Midas Oil Co.,* 123 S. W. (2d) 911, the other case so cited, it was contended that the assignee of a lease adjacent to that upon which permit was granted was not authorized to maintain a suit to cancel the permit. Discussing this question, the court said:

> "That is the term the Legislature did use in Sec. 8 of Art. 6049c. Not only is this true,

but there is a manifest difference between the subject-matter of Art. 8307 and that of Art. 6049c. In the former, the rights granted to the employee for compensation are personal to him. Whereas, under Art. 6049c the rights involved, and subject to suit in an attack upon the Commission's order, are not personal, **but the suit so authorized is for the protection of the adjacent properties against drainage, confiscation, or damage, irrespective of ownership.** The mere fact that the ownership of such property changes hands after the hearing before the Commission has no bearing whatever on the **character, extent, or nature of the injuries, if any, which result thereto by virtue of the Commission's order. These are the matters which the Legislature intended to protect,** and the ownership thereof whether acquired before or after the Commission's order is made, is, we think, but incidental so long as the owner of the property affected seasonably acts under the statute. We conclude, therefore, that the District Court had jurisdiction to try these issues in the suit brought by the Stanolind Oil Company."

The oil and gas conservation statutes and rules promulgated pursuant thereto have sought to limit the number of wells that can be drilled in the oil fields of Texas for the purpose of preventing waste. Their validity has been sustained as being calculated to promote that object.

If it is desirable that wells in the East Texas oil field be drilled, in the absence of special circumstances, 660 feet from each other, each operator in the field has a direct personal interest in restricting the drilling in the neighborhood of his land

to the pattern that is applicable to his own land or to as close an approximation thereof as is possible.

The statements made in the cases cited by Petitioners, when considered in connection with the quotations made above, clearly show that the purpose of the appeal statute here involved was to permit an operator to protect his property from the injurious effects of special permits granted on adjacent land, and not authorized by Rule 37 under the facts existing at the time.

The contention that the statutory appeal under Section 8 of Article 6049c, Vernon's Texas Civil Statutes, provides for determination of abstract questions between parties who have no adverse legal interests, would seem to be conclusively answered by the fact that Rule 37, equivalent to a statute (*Sun Oil Company vs. Railroad Commission*, 68 S. W. (2d) 609, affirmed by the Supreme Court in *Bennett vs. Sun*, 125 Texas 540), as originally adopted, prohibits the drilling of any well closer than 150 feet to the lease boundary line, and, as amended, closer than 660 feet thereto without a special permit. The cancellation of a permit order based on the holding that the facts existing at the time it was granted did not justify it, necessarily renders the permit null from its date, and causes the immediate closing of the well and stoppage of production therefrom.

This follows from the general provisions of Rule 37, requiring a special permit, and also from the specific provision as follows:

"No well drilled in violation of this rule without special permit obtained in the manner prescribed in said rule, and no well drilled under such a special permit which does not conform in all respects to the terms of such permit, shall be permitted to produce either oil or gas; and any such well so drilled in violation of said rule or in violation of a permit granted as a special exception to said rule shall be plugged." (Alleged in paragraph 4 of the amended Bill of Complaint of the Sun Oil Company and admitted by the Commission and the XYZ Company,—Rec. 7, 51, 72)

Even if the law did not require immediate stoppage of production from wells, the permits for which have been cancelled, the substantial nature of the controversy involved in this case is evident when it is considered that an ancillary injunction to prevent further production from the well is prayed for and will undoubtedly be included in any final judgment cancelling the permit.

It is contended that the substantive right of an adjacent operator to protect himself is found in his right to apply to the Railroad Commission for an exception to drill an offset well or wells on his land, and that the right given him to appeal to the courts and test the validity of the order granting the exception to his neighbor does not confer upon him a substantive right by way of protection of his property, but merely gives him the opportunity to secure an academic statement from the court as to the validity of the permit he attacks.

Even if the numerous adjudicated cases in which oil operators have secured final judgments cancel-

ling permits and closing wells were not a sufficient answer to this argument, it is conclusively refuted by the following statement of the Supreme Court in *Railroad Commission vs. Shell Oil Company*, 139 Tex. 66, 161 S. W. (2d) 1022, 1027:

> "The Attorney General contends that since none of those now contesting the granting of the permit in question have applied for and been refused a like special permit, we have no ground to assume that such a permit would be refused if requested, and, consequently, there is no evidence of discrimination against them and they are not in a position to complain. However, in our opinion, the adoption and retention of the general provisions of Rule 37 requiring all operators in the East Texas oil field to space their wells at least 660 feet apart is in itself a denial of closer spacing to every operator in the field. In addition, the Act here in question specifically provides that any interested party may contest the granting of such a permit. It has frequently been held that adjoining landowners such as the present protestants are interested within the meaning of the statute. Humble Oil & Refining Co. v. Railroad Commission, Tex. Civ. App., 112 S. W. (2d) 222, par. 7; Empire Gas & Fuel Co. v. Railroad Commission, Tex. Civ. App., 94 S. W. (2d) 1240, par. 12, writ refused; Murphy v. Turman Oil Co., Tex. Civ. App., 97 S. W. (2d) 485, par. 2."

In this connection we call attention to the fact that Rule 37 provides that "such exception shall be granted only after at least 10 days notice to all adjacent lessees affected thereby has been given", and by the fact shown by the undisputed evidence

that the Sun Oil Company and the Magnolia Petroleum Company were given notice of the hearing held by the Railroad Commission on the application involved in this case.

We also refer to the decisions in *Shell Pet. Corp. vs. R. R. Com.*, 133 S. W. (2d) 194, 196 (error refused) and *R. R. Com. vs. Shell Oil Co.*, 165 S. W. (2d) 503, 504, to the effect that the Railroad Commission cannot grant a well permit order in relation to the necessities of a tract unless all operators of land adjacent thereto who are interested parties have been given the notice provided by Rule 37.

Petitioners insist that the holding in *Magnolia vs. Edgar*, 62 S. W. (2d) 259, to the effect that the Railroad Commission is the only necessary party defendant in such suits shows that it is not an adversary proceeding and therefore not such a "case or controversy". A reference to the Edgar case just cited will show that the holding was that the **Railroad Commission represented all parties at interest including the permittee and that the case could therefore proceed against it alone.**

While this holding does not in the slightest degree indicate that such a case is not an adversary proceeding in which valuable property rights are definitely and finally adjudicated, the holding made therein should be considered in connection with the following cases indicating that the permittee is a necessary party: *Railroad Commission vs. Rau*, 45 S. W. (2d) 413, 416; *North Texas Coach vs. Marten*, 92 S. W. (2d) 263, 265; *Turman Oil Co. vs. Roberts*, 96 S. W. (2d) 724, 726; *Reynolds vs. Ward Oil Corp.*,

157 S. W. (2d) 457, 459; *T. & N. O. vs. Greer,* 117 S. W. (2d) 148.

The contention that this is not an adversary proceeding because the Railroad Commission may be the only necessary party thereto, is effectively answered by the fact that it is the duty of the Commission, as held in the *Edgar* case, to represent all parties interested in the maintenance of the validity of the permit. The character of the resistance offered by the Commission, represented by the Attorney General in the case at bar, would seem to show that the Magnolia Petroleum Company and the Sun Oil Company would not lack an adversary even if the permittee were not in court. As it is in court, the contention seems to lack merit.

The question as to whether this proceeding will settle the property rights of the parties depends, not on the law as to who are necessary parties, but on the effect of the judgment that will be rendered in favor of a successful plaintiff or a successful defendant.

Petitioners further insist that this Texas appeal statute does not provide a new substantive right but a mere procedural remedy. We submit that this argument is completely refuted by the following statement in *Gulf Land Company vs. Atlantic Refining Company,* 134 Tex. 59, 131 S. W. (2d) 73, 81-82:

> * * * "The action provided by statute for an appeal to a district court of Travis County to review the rules and orders of the Commission is clearly not an ordinary civil action. **To the**

contrary, it is a special statutory action to enforce a right which exists only by statute, and not under the Constitution or at common law. Alpha Petroleum Co. v. Terrell, 122 Tex. 257, 59 S. W. (2d) 364; Id., 122 Tex. 257, 59 S. W. (2d) 372."

We also refer to *Alpha Petroleum Company vs. Terrell*, 59 S. W (2d) 364 (opinion adopted by the Supreme Court), in which the Court held that the statutory appeal here involved confers upon the plaintiff a right he did not theretofore have; that prior thereto his right to annul a rule or order of the Commission depended upon a showing that it was utterly void on its face. The Court held that if the suit had been one to enforce a right existing under the Constitution or the common law, the Legislature could not have taken away the constitutional jurisdiction of the various district courts of Texas, but that, being a suit to enforce a right which exists only by operation of the statute, the Legislature could restrict the venue to Travis county. We also cite *Railroad Commission vs. H. & T. C.*, 90 Tex. 340, 354.

II

Under subdivision (b) of question (1), Petitioners first state that this appeal does not involve legislative or administrative action by the court; then devote considerable space to a discussion of the statement by Judge Hutcheson as to exercise by the trial court of its independent judgment on the question of reasonableness or necessity. As heretofore insisted, we submit that the courts, in passing on

statutory appeals from Rule 37 permit orders, are not called upon to make any decision as to the reasonableness thereof, except in the sense that an order that is not justified by the existing facts is unreasonable and arbitrary. As the policy with regard to the granting of exceptions is specifically fixed and established by the terms of Rule 37, as interpreted by the highest court of Texas, no other question as to "reasonableness" could be involved in such an appeal.

Petitioners argue, however, that the determination by the court that certain testimony shows that a certain tract is being drained and that certain other testimony does not show that fact, involves a decision of administrative policy. As the decision as to drainage *vel non* must be made by the Railroad Commission in its exercise of quasi-judicial power, and as this decision involves no administrative policy; but only the weighing of evidence; the finding by the court as to the fact of drainage or non-drainage likewise involves judicial and not administrative action.

III

In reply to question (1c), Petitioners insist that the provisions as to appeal to the Court of Civil Appeals, Supreme Court, etc., clearly restrict the words "a court of competent jurisdiction in Travis County, Texas", to such a state court.

In view of the holding in *Reagan vs. Farmers Loan & Trust Co.*, 154 U. S. 362, and the other cases heretofore cited, and of the subsequent enactment of

the appeal statute herein involved, it is clear that the Legislature intended by these provisions to regulate the appeal as to the cases that are filed in the state district courts, but to leave procedural matters as to the cases that are filed in the federal court subject to regulation by the law applicable to that forum.

A lengthy argument made with regard to the new rules of civil procedure for the district courts of the United States is equally without foundation.

IV

Petitioners, in response to question (3) again base their argument on the insistence that the law in Texas is not clear as to whether the courts trying a Rule 37 permit order appeal may exercise their independent judgment on what is "reasonable". We have heretofore discussed that question, and repetition is unnecessary.

A somewhat lengthy argument is made as to the proper interpretation in this respect of the opinion in *Railroad Commission vs. Shell Oil Co.*, 139 Tex. 66, 161 S. W. (2d) 1022. As to that, we refer the court to the discussion on pages 63 to 72 of the

brief of the Sun Oil Company and Magnolia Petroleum Company heretofore filed in this court.

Emphasis herein is supplied.

Respectfully submitted,

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